Supreme Court, U.S.
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No. 10- 10-93

IN THE

Supreme Court of the United States

STALLION, INC.,

Petitioner,

v.

JOHN GALLIANO, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States, in order to protect fundamental due process rights of notice and opportunity to be heard, requires foreign language pleadings to be translated into English when served in the United States pursuant to the Hague Convention.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Stallion, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the New York State Court of Appeals is not yet reported, but is published at 2010 WL 2265022, as well as at 2010 N.Y. Slip Op. 04829, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-8a. The opinion of the New York State Supreme Court, Appellate Division, First Department is reported at 62 A.D.3d 415, 879 N.Y.S.2d 400 (1st Dept. 2009), and is reprinted at Pet. App. 9a-12a. The opinion of the Supreme Court of the State of New York, County of New York is reported at 19 Misc.3d 1108(A), 859 N.Y.S.2d 903 (Sup.Ct., N.Y. Co. 2008), and is reprinted at Pet. App. 13a-21a.

JURISDICTION

The opinion of the New York State Court of Appeals was decided on June 8, 2010. This Court has jurisdiction under 28 U.S.C. § 1257.

TREATIES, CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, Article 5

> The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –
>
> (a) by a method prescribed by its internal law for the service of documents in domestic

actions upon persons who are within its territory, or

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

> The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered . . .

Fifth Amendment to the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Civil Practice Law and Rules §5304(a)(2)

(a) No recognition. A foreign country judgment is not conclusive if:

* * * * *

2. the foreign court did not have personal jurisdiction over the defendant.

New York Civil Practice Law and Rules §5305(a)(3)

(a) Bases of jurisdiction. The foreign country judgment shall not be refused recognition for lack of personal jurisdiction if:

* * * * *

3. the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved.

PRELIMINARY STATEMENT

Plaintiff-Respondent John Galliano, S.A. seeks recognition of a default judgment issued in a French action in which Defendant-Petitioner Stallion, Inc. contends it did not receive "notice reasonably calculated to apprise" it of the pendency of that foreign proceeding because the French writs served upon it in the United States were not translated into English, even though (a) the United States mandates translation for service under the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters (the "Hague Convention"), (b) French law also requires that all writs served on defendants in the United States be served together with English translations, and (c) principles of comity require an English translation since French law requires that foreign pleadings served on French nationals in France be translated into French.

Recognizing a foreign judgment under these circumstances in the absence of any reasonable notice to Stallion would run afoul of fundamental principles of constitutional due process, set aside an important procedural safeguard on Hague Convention service, and establish a dangerous precedent for disputes involving United States companies doing business abroad. Such recognition would also run afoul of established precedents in federal and state courts nationwide.

The decision below has been described by at least one noted commentator, David D. Siegel, in his New York State Law Digest as "the most interesting ground argued by defendant . . . [which the Court] doesn't make much of." Professor Siegel also recognized that enforcing this default judgment depended on comity.

Here, notably, French courts require that foreign pleadings be translated into French when served on French Nationals in France pursuant to the Hague Convention.

For the foregoing reasons, the judgments of the trial and appellate courts must be reversed and Respondent's motion for summary judgment in lieu of complaint denied.

STATEMENT OF THE CASE

A. United States' Requirement for Translation of Documents Served Under the Hague Convention

This petition requests review of the enforceability of a French default judgment against a New York corporation based upon the service in New York of foreign language pleadings in violation of (a) the United States requirement, under the Hague Convention, that such pleadings be translated into English, (b) the French requirement, under the rules of the Paris Prosecutor's Office, that all writs served on defendants in the United States be accompanied by English translations, and (c) the principles of the comity, since French law requires that foreign pleadings served on French nationals in France be translated into French.

Article 2 of the Hague Convention requires that each Member State designate a "Central Authority" to receive requests for service from other Member States. The United States designated the Department of Justice ("DOJ") as its Central Authority.

Article 5 of the Hague Convention, which govern the administration of service of foreign pleadings, require *inter alia* that whenever service of process is not accepted voluntarily, a Member State's Central Authority shall arrange to have process served "by a method prescribed

by its internal law for the service of documents in domestic actions . . ." If the document is so served, "the Central Authority may require the document served to be written in, or translated into, the official language or one of the official languages of the State addressed."

In July 2003, the Permanent Bureau of the Hague Conference on Private International Law ("HCCH"), which has "primary responsibility for administrative issues" regarding the Hague Convention, solicited responses from Member States to its questionnaire to update its 1992 handbook regarding service of pleadings abroad and to redesign the Hague Conference's website. Each Member State was asked to "specify the extent and scope of requirements for translation, if any (translation of documents to be served, translation of document's summary, translation of evidence to be served, etc.).

In October 2003, DOJ - acting in its capacity as the United States Central Authority - submitted a twelve-page response to the Questionnaire, advising that it had outsourced formal service requirements to a private contractor, Process Forwarding International ("PFI"), and that:

> "[A]ll formal requests for the service of documents made pursuant to Article 5(1) and submitted to Process Forwarding International must be translated into English, *along with a translation of the underlying documents*." (102-103, 115) (emphasis supplied).

B. Applicability of the Hague Convention In This Case

The default judgment was based upon a license agreement entered into in February 1998 between Respondent's predecessor-in-interest and Stallion, entered into and performed in New York. All dealings between the parties were conducted in English since the principals and employees of Stallion do not speak or read French. Respondent's predecessor-in-interest, Les Jardins D'Avron, maintained an office in the City of New York and engaged in business there. Respondent John Galliano, S.A. is a French company which was substituted in place for Les Jardins in the license, which covered the use of the "John Galliano" trademark for the production and distribution of luxury apparel, particularly fur garments, in the United States market.

Although the License provided that disputes between the parties would be submitted to the French courts, the performance of the License was based in the United States, the territory of the License was limited to the domestic market of the United States and the two trademarks covered by the License were United States trademarks. Under the terms of the License, the products were required to be produced solely in Stallion's plant in New York, with a "Made in the USA" label to be included "subject to compliance with applicable United States law". The promotion minimum and the minimum annual guaranteed royalty under the License was set in United States dollars. The currency of the royalties was to be in United States dollars. The agreement also contemplated visits by John Galliano of Les Jardins to the United States, requiring Stallion to

hire a bodyguard to protect Mr. Galliano during such visits. The License agreement was negotiated in English and reduced to written form in English.

C. Dispute Between Stallion and Galliano

In 2001, Petitioner accused Stallion of not performing its obligations under the License and claimed outstanding royalties in the amount of $187,500.00. In turn, Stallion demanded payment of $89,067.26 for goods, wares, and merchandise that Stallion sold and delivered to Les Jardins between March 19, 1998 and March 28, 2000. Throughout November and December 2001, the two parties participated in settlement negotiations through their counsel - in English - attempting to resolve their dispute, but failed to reach agreement.

D. The French Action and the Default Judgment

Sometime in 2002, Galliano commenced an action in Paris, France, to recover moneys allegedly due from Stallion. Over a period of sixteen months, from December 16, 2002 through March 16, 2004, three "writs" (the French equivalent of a complaint) were purportedly delivered to Stallion's office and left with its support staff. None of the writs were translated into English. The first writ was rejected by the French court and the second writ was withdrawn by Galliano due to its own error. After Stallion did not appear and defend itself in the French proceeding, the French court issued a default judgment based on the third writ against Stallion in the amount of $335,297.

E. Galliano Moves to Enforce the French Default Judgment in New York

Three years later, on July 5, 2007, Petitioner commenced the present action to enforce the French default judgment by service of a summons with motion for summary judgment in lieu of complaint pursuant to §3213 of New York's Civil Practice Law and Rules. The French judgment, now with an English translation, was submitted in support of the motion. The affidavit of service of the first writ states that it was served upon "Rita (receptionist)"; the affidavit of service of the second writ states that it was served upon "Fran Cannara as legal clerk"; and the affidavit of service of the third writ, on which the default judgment was based, states that on March 16, 2004 "documents from France" were served upon Stallion by ". . . presenting to and leaving the same with Fran Cannara – executive secretary".

In opposition to the motion, Stallion contended *inter alia* that the mere delivery of the French language documents, in violation of the translation requirement adopted by DOJ, did not constitute proper service under the Hague Convention and deprived the French Court of personal jurisdiction over Stallion. Stallion's president submitted an affidavit in which he stated that neither he nor Fran Cannara read or speak French, and that Ms. Cannara was not an officer of Stallion, that she had no authority to act on its behalf, and that she was employed as support staff in Stallion's fur storage area.

F. The Lower Court Grants Galliano Summary Judgment in Lieu of Complaint

In its decision granting summary judgment, the lower court rejected Stallion's proof of the DOJ translation requirement, which included excerpts of the DOJ Questionnaire Response on the HCCH website and relevant portions of the actual DOJ Questionnaire Response.

Stallion moved to renew and reargue, submitting correspondence from the First Secretary of the Permanent Bureau, who confirmed receipt of the official U.S. response to the Questionnaire, and noted that the U.S. response could be accessed on the HCCH website (*www.hcch.net*), which contained copies of all official responses made by members of the HCCH to the Questionnaire. Stallion noted that references to the DOJ's translation requirement were also included in the official "Practical Handbook on the Operation of the Hague Service Convention" published by the HCCH (the "Hague Convention Handbook"). In its Response to the Questionnaire, DOJ also stated that, in providing updated country-by-country information relating to the Convention's operation, it would consider it useful for the website to include translation requirements.

The Hague Convention Handbook referred the reader to the HCCH website (cited in Stallion's opposition to summary judgment) to determine whether or not a Member State requires translation, and noted that a large number of States which responded to the Questionnaire required a translation of documents to be served.

Stallion also established (through documents obtained in a FOIA request) that the DOJ's English translation requirement is evidenced in diplomatic communiqués by both DOJ and the United States Department of State. For instance, in its May 7, 2003 Communiqué to the Organization of American States, DOJ provided notice of its translation requirement and its designation of PFI as process server with respect to service of process under the Inter-American Convention on Letters Rogatory and the Hague Convention. The communiqué stated in part that:

> Beginning June 1, 2003 requests [for service of process] should be transmitted to Process Forwarding International. Requests for service must be transmitted in duplicate and *with an appropriate translation of documents to be served.* (emphasis supplied).

Additionally, a "Circular Note" from Secretary of State Colin L. Powell dated June 4, 2003 "on provision of certain judicial assistance" informed foreign diplomats "of certain changes to the way judicial assistance is afforded . . . to litigants before [foreign] tribunals by the Government of the United States". The Note stated that:

> The purpose of this circular diplomatic note is to announce *a change* in how requests . . . for service of process in civil and commercial matters will be handled in the United States. This change will affect countries party to the Hague Convention . . . and the Inter-American Convention on Letters Rogatory and Additional Protocol.

* * *

> Beginning in June 1, 2003, request for service of process should be transmitted to Process Forwarding International. *Requests for service must be transmitted in duplicate with an appropriate translation.* (*Id.*) (emphasis supplied).

On September 24, 2008, the lower court denied reargument and renewal, dismissing, out of hand, Stallion's documentary evidence establishing DOJ's translation requirement as "merely an advisory draft by a Department of Justice employee". In so doing, the trial court apparently overlooked the formal DOJ Questionnaire Response submitted as an exhibit to Stallion's opposition papers and instead mistakenly referred to a draft of the DOJ response, which was also included as part of the same exhibit.

G. New York's Appellate Division Upholds the Lower Court's Decision

New York's Appellate Division, First Department reversed the lower court's denial of Stallion's motion to renew, finding that renewal should have been granted to consider the documents that defendant obtained from DOJ via its FOIA request. However, the Appellate Division nonetheless upheld the lower court's grant of summary judgment on the basis of §5305(a)(3) of New York's Civil Practice Law and Rules, a provision neither mentioned by any of the parties nor relied on by the lower court. In particular, the appellate court ruled that:

> It is true that CPLR §5304 (a) (2) declares a foreign country judgment to be not conclusive if the foreign court never had personal jurisdiction over the defendant. However, CPLR §5305 (a) (3) states that a foreign country judgment should not be refused recognition for lack of personal jurisdiction if "the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the matter involved." Prior to commencement of the French proceedings, defendant entered into a contract in which it agreed that all disputes would be submitted to a French court, effectively establishing personal jurisdiction under CPLR §5305 (a) (3). *Id.*

H. After Granting Leave to Appeal, New York's Court of Appeals Affirms

The New York State Court of Appeals agreed with Stallion's contention on appeal, and stated that

> [I]f recognition of a foreign money judgment were sought in New York and the defendant had received no meaningful notice of the foreign proceeding, that lack of notice would serve as a legitimate basis for not enforcing the judgment in our State, as the entry of such a judgment would not comport with our conception of personal jurisdiction or our notion of fairness. Pet. App. 5a.

However, the Court of Appeals thereafter held that under the Hague Convention, it was for "the Paris Commercial Court to consider whether service on Stallion was properly made." Pet. App. 7a. The Court then gave wide deference to the French court, finding that

> "[g]iven that the Paris Commercial Court entered a judgment in Galliano's favor in Stallion's absence, it would seem clear that it was 'established' to that court's satisfaction that [the Hague Convention's] requirements were met." Pet. App. 7a.

The Court then summarily found, without explanation, that

> [W]e are satisfied that Stallion had notice of the proceeding in France 'in sufficient time to enable [it] to defend' itself in that action..., and the Paris Commercial Court's exercise of personal jurisdiction over Stallion under these circumstances was not unfair...because the French court's money judgment in favor of Galliano does not run afoul of our conception of personal jurisdiction or our notion of fairness . . . Pet. App. 8a

Thus, the Court of Appeals made it possible for Respondent and other foreign entities to ignore the requirement of DOJ as Central Authority under the Hague Convention, as well as from the United States Department of State, that "[r]equests for service must be transmitted in duplicate with an appropriate translation."

REASONS FOR GRANTING THE PETITION

This case presents the fundamental question whether United States Constitution's requirements of fair play and substantial justice, as embodied in the Due Process clause of the Fifth and Fourteenth Amendments via the DOJ's requirements as Central Authority to the Hague Convention, may be side-stepped by a foreign entity in seeking a default judgment in a foreign court over a United States company doing business exclusively in the United States. The answer to that question is of paramount importance to United States companies doing business abroad especially given the foreign entity's requirement that United States pleadings served in the foreign entity's country be translated into that country's native language.

Although the Court of Appeals noted that Stallion had entered into a contract in which it agreed that all disputes would be submitted to a French court, effectively establishing personal jurisdiction, the Court failed to recognize the inherent dichotomy in the concept of personal jurisdiction between (a) the power of the French court to bring Stallion in so that it could hear and decide the dispute, and (b) effecting personal service of process upon that United States defendant.

This very Court has held that, "personal jurisdiction in a given dispute is conditioned on both a court's ability to assert jurisdiction over a defendant *and* defendant's receipt of notice and opportunity to be heard." *Employers Ins. of Wausau v. Banco De Seguros Del Estrado*, 199 F.3d 937, 943 (7th Cir. 1999) (*citing Phillips*

Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985)) (emphasis supplied); *Flexi-Van Leasing, Inc. v. Gulf Fleet Marine Corp.*, 108 F.R.D. 116 (S.D.N.Y. 1985) (distinguishing between personal jurisdiction and service of process, and noting that "although related, these two concepts are distinct").

As the Court of Appeals for the Ninth Circuit explained recently:

> The familiar 'minimum contacts' test, coupled with statutory authorization, provides *a basis* for an exercise of jurisdiction, but service of process is the *mechanism* by which the court actually acquires the power to enforce a judgment against the defendant's person or property. In other words, service of process is the means by which a court asserts its jurisdiction over the person. Service of process has its own due process component, and must be 'notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' . . . Without a proper basis for jurisdiction, or in the absence of proper service of process, the district court has no power to render any judgment against the defendant's person or property unless the defendant has consented to jurisdiction or waived the lack of process.

Sec. and Exch. Comm'n v. Ross, 504 F3d 1130, 1138-39 (9th Cir. 2007) (*quoting Mullane*, 339 U.S. at 314) (emphasis in the original).

It is the latter that this Petition is based on, namely improper service of process. Stallion contends that it was not, as the New York State Court of Appeals stated, for "the Paris Commercial Court to consider whether service on Stallion was properly made," Pet. App. 7a, but for the United States courts to make that determination, based on their own interpretation of the Hague Convention and the United States Central Authority regulations in furtherance therewith. Stallion contends that the Court of Appeals' finding that, "it would seem clear that it was 'established' to [the French court's] satisfaction that [the Hague Convention's] requirements were met," (Pet. App. 7a) constitutes undue, speculative deference to a foreign court over a United States defendant, and plain error.

I. RESPONDENT'S FAILURE TO EFFECT PROPER SERVICE UNDER THE HAGUE CONVENTION BY TRANSLATING THE FRENCH PLEADINGS INTO ENGLISH AS REQUIRED BY THE DEPARTMENT OF JUSTICE DEPRIVED THE FRENCH COURT OF PERSONAL JURISDICTION OVER STALLION

In the courts below, Stallion established that the United States requires English translation of litigation documents served in the United States under the Hague Convention. Specifically, and in response to the Hague Convention's Permanent Bureau's request to "specify the extent and scope of requirements for translation", DOJ stated plainly that:

> "all formal requests for the service of documents made pursuant to Article 5(1) . . .

must be translated into English, *along with a translation of the underlying documents.*" (emphasis supplied).

The DOJ went on to elaborate:

> We do not believe that requiring a translation of documents to be formally served is contrary to the spirit or letter of Article 5(3). Rather than making judicial assistance more cumbersome, we believe that it makes service easier to accomplish, and avoids unnecessary delays . . .
>
> * * *
>
> In addition, while the translation requirement for formal service imposed under Article 5 may create an additional burden on the requesting party, in many States, including the United States, it provides some degree of assurance that the recipient of the service of process is accorded full due process. *Where the documents have not been translated sufficiently to enable the recipient to obtain a general understanding of the nature of the proceeding, courts could find that adequate notice and an opportunity to defend themselves was not accorded the recipient of the service, and any subsequent judgment could become unenforceable.* For that reason, we believe that the translation requirement is fully consistent with the spirit of the convention, and the desire to ensure that fair and equitable justice is provided all litigants (emphasis supplied).

In interpreting a provision of the Hague Convention, this Court has held that "to ascertain the [ ] meaning of [a treaty] we may look beyond the written words to the history of the treaty, the negotiations and the practical construction adopted by the parties." *Volkswagenwerk Aktiengesellschaft v. Schluck*, 486 U.S. 694, 700 (1988).

DOJ's response to the Hague Convention Questionnaire, its communiqué to the Organization of American States and the Department of State Circular Note are pronouncements made by United States government agencies charged with implementation and enforcement of the Hague Convention and are definitive regarding the application of the Convention in this country. *Kolovrat v. Oregon*, 366 U.S. 187, 193 (1966) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight"); *El A. Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 172 (1999) ("The reasonable view of the Executive Branch concerning . . . an international treaty ordinarily merits respect.").

The Appellate Division, First Department's decision below acknowledged that other courts in the United States have recognized the authoritative nature of these official pronouncements regarding adoption of the translation requirement. Pet. App. 10a.

The United States is not alone in requiring translation of documents formally served under the Hague Convention. Twenty-nine other Hague

Convention Member States impose a similar translation requirement, including France as well as Canada, China, Germany, Ireland, Israel, Russia, Spain, Sweden and The United Kingdom.

DOJ's stated rationale for adopting the translation requirement is instructive in its embrace of the due process requirements enunciated in those decisions:

> [The translation requirement] provides some degree of assurance that the recipient of the service of process is accorded full due process. Where the documents have not been translated sufficiently to enable the recipient to obtain a general understanding of the nature of the proceeding, courts could find that adequate notice and an opportunity to defend themselves was not accorded the recipient of the service, and any subsequent judgment could become unenforceable. For that reason, we believe that the translation requirement is fully consistent with the spirit of the convention, and the desire to ensure that fair and equitable justice is provided all litigants.

Having established the mandatory nature of the translation requirement, it follows that foreign language documents which do not satisfy that requirement cannot serve as a basis for jurisdiction for failure to satisfy the Hague Convention and basic due process. As such, Stallion's purported "default" in the French proceeding was neither willful nor negligent as a matter of law, and it could not be faulted for failing to respond to papers

in a foreign language that were thrust into the hands of its support staff.

This reading of the Hague Convention translation requirement is consistent with a large body of decisional law in the United States. For instance, *Julien v. Larson*, 25 Cal. App.3d 325, 101 Cal. Rptr. 796 (1972) is directly on point. There, a foreign plaintiff sought to enforce a default judgment against a U.S.-based company issued by a Swiss court. Affirming a lower court's refusal to enforce the judgment, the California Court of Appeals held that plaintiff's failure to properly serve defendant with English translation of German documents deprived the Swiss court of personal jurisdiction over defendant. The *Julien* court held that "the Swiss court could acquire personal jurisdiction over defendant only by effective service of its process" and that "the process served must give defendant sufficient notice of the pending foreign proceeding to satisfy the requirements of due process of law." *Id*, 25 Cal. App.3d at 327-28, 101 Cal. Rptr. at 798. Specifically, the appellate court held that:

> [W]e think at a minimum a defendant should be informed in the language of the jurisdiction in which he is served (in California,[it is] English) that a legal action of a specific nature is pending against him at a particular time and place.

Id., 25 Cal. App.3d at 329, 101 Cal. Rptr. at 798.

Paradoxically, a French court would not enforce a default judgment issued against one of its citizens under these same facts and circumstances. France adheres to the same fundamental principle of due process embodied in the translation requirement, both as a matter of domestic and international law. Like the majority of other signatories to the Hague Convention, France requires translation of documents that are being formally served under Article 5. Moreover, under the French Code of Civil Procedure, the exclusive method of effecting proper service of process involves service of documents written in or translated into French by a French sworn (court-appointed) interpreter. *See* Herzog, Civil Procedure in France (Martinus Nijhoff, The Hague, The Netherlands 1967), at 594, *citing in part* Jurisclasseur De Droit International, Fasc.584, at Nos. 36-38 (1963).

Federal and State United States courts hold that the inverse is also true. In *Lasky v. Cont'l Prods. Corp.*, 97 F.R.D. 717 (E.D. Pa 1983), the court vacated a default judgment entered against a German company which was never served with process under the Hague Convention. The German authorities had rejected the original U.S. documents plaintiff had forwarded for service because these documents were not accompanied by the requisite translations into German. *Id.*, 97 F.R.D. at 719. The court held that "it is quite understandable that a foreign entity . . . would not understand that [it] had been served and [was] required to answer." *Id. See also Am. River Transp. Co. v. M/V Bow Lion*, 2004 WL 764181, at 2 (E.D. La. April 7, 2004) (Dismissing an action because of improper service of process where plaintiff "did not translate the pleadings into Korean pursuant to terms

of the Hague Convention"); *Teknekron Mgmt, Inc. v. Quante Fernmeldetechnik*, 115 F.R.D. 175 (D. Nev. 1987) (Holding service improper under the Hague Convention and granting defendant's motion to dismiss where the German Central Authority had accepted and delivered service papers which included an exhibit to the complaint that was not translated into German).

State court holdings on the issue are fully consistent. In *Ward v. Ludwig*, 778 N.E.2d 650 (Ohio App. 4th Dist., 2002), plaintiff served defendant, a German citizen, with a copy of the complaint he filed in the Ohio state court. The complaint was not translated into German, as required by Germany under the Hague Convention. Defendant failed to properly appear and a default judgment was eventually entered against her. Subsequently, defendant moved to vacate the default judgment, claiming that the Ohio court which issued the judgment lacked jurisdiction since defendant "was never properly served with the summons and complaint in compliance with the Hague Convention." *Id.*, 778 N.E.2d at 652. As in the case at bar, the plaintiff in *Ward* argued that, even if he had not properly served the defendant under the Hague Convention, the defendant had "received actual notice [of the action against her], understands the English language, and had a German lawyer file an answer to the complaint." *Id.*, 778 N.E.2d at 653. The appellate court disagreed:

> We do not think that a trial court should have to determine on a case-by-case basis whether a defendant and her foreign lawyer understand enough English language so that they can interpret legal documents. Here, we

> would have to guess whether [defendant] and her German lawyer understand English well enough to interpret the complaint and related papers . . . Consequently, actual notice of the complaint and related papers written in English language . . . is insufficient. *Id.*

See also In re Alyssa F., 6 Cal. Rep. 3d 1, 4 (Cal. App. Ct. 2003) ("Failure to properly serve a party who resides outside the country under the Hague Service Convention renders all subsequent proceedings void as to that person"); *Johnson v. Pfizer, Inc.*, 2002 WL 1041984, at 3 (Conn. Super. Ct. 2002) (Plaintiff's failure to translate the summons into Swedish warranted dismissal); *Honda Motor Co., Ltd. v. Superior Court*, 12 Cal. Rptr.2d 861 (Cal. App. Ct. 1993) (Granting Japanese corporation's motion to quash service of summons because, among other things, the service "papers were unaccompanied by any Japanese translation").

Johnson v. Pfizer, Inc., supra, is equally on point. There, as here, plaintiff attempted to effect service on a defendant located in Sweden through that country's Central Authority. Sweden, like the United States, imposes a translation requirement on documents being served under the Hague Convention. Plaintiff failed to translate the summons, even though he translated the complaint. The court granted defendant's motion to dismiss, finding that the purpose of the Hague Convention is, in part, "to assure that the defendants sued in foreign jurisdictions would receive actual notice of suit." *Johnson*, 2002 WL 1041984, at 3 (*citing Volkswagenwerk v. Schlunk*, 486 U.S. 694 (1988)

(quotations omitted). The court found that the translation requirement imposed by Sweden,

> . . . comports with that purpose [in] that the person or entity being sued receive a document describing the nature of the suit in his, her or its native language—nothing else would be fair. *Id.*

New York courts have decided this issue consistently, and have "uniformly held that service of process in violation of the [Hague] Convention, which is part of the supreme law of the land, will not be upheld." Comm. on Federal Courts of New York State Bar Assn., *Service of Process Abroad: A Nuts and Bolts Guide*, 122 F.R.D. 63, 73 (1989). For instance, in *Reynolds v. Koh*, 109 A.D.2d 97 (3d Dep't 1985), the court affirmed the lower court's dismissal for lack of jurisdiction where plaintiff attempted to effect service of process on a Japanese defendant by registered mail. The appellate court noted that Japan does not permit "methods of service other than those using" that country's Central Authority. 109 A.D.2d at 100. The court held that plaintiff's failure to properly effect service through Japan's Central Authority deprived the New York court of personal jurisdiction over defendant, even though defendant had voluntarily accepted the service documents at issue in that case. *Id.*; *see also Derso v. Volkswagen of Am., Inc.*, 159 A.D.2d 937(4th Dep't 1990) (holding that jurisdiction over a German company was not acquired via service that "did not comply with the procedural requirements of the Hague Service Convention").

Here, similarly, Respondent did not translate the service papers, and PFI, DOJ's designated process server, accepted and delivered the untranslated papers. The fact that PFI accepted and served untranslated documents does not override or negate the invalidity of the service. Process servers do not establish policy for the United States.[1]

The decisions cited above all stand for the proposition that a foreign defendant is deprived of basic due process when proper service is not made in conformance with the Hague Convention. Stallion, at the very least, is entitled to the same due process that our courts have afforded to foreign defendants under circumstances virtually identical to this case.

II. RESPONDENT'S FAILURE TO SERVE PROCESS SUFFICIENT TO ACCORD STALLION REASONABLE NOTICE AND OPPORTUNITY TO BE HEARD DEPRIVED THE FRENCH COURT OF PERSONAL JURISDICTION, EVEN WHERE STALLION HAD CONTRACTUALLY AGREED TO FRENCH JURISDICTION

In reversing the motion court's ruling below that no evidence was presented regarding the translation requirement, the Appellate Division, First Department nonetheless failed to address the central issue of violation of Stallion's due process rights by defective service under the Hague Convention and upheld the

1. Even PFI confirmed that translation of documents it serves under the Hague Convention must be translated into English unless defendant accepts service voluntarily.

decision below on different grounds never previously raised by the parties or addressed by the lower court. Citing New York's CPLR § 5305(a)(3)[2], the appellate court held, in error, that Stallion's due process challenge to the French court's exercise of personal jurisdiction is precluded by the forum selection clause in Stallion's contract with Respondent, which provided that disputes under the contract "shall be submitted to the competent court" in France.[3] Pet. App. 11a. Stallion contends that the appellate court's construction of CPLR §5305(a)(3) and its application in this case run afoul of fundamental principles of constitutional due process.

As a threshold matter, exercise of personal jurisdiction is premised on the fundamental due process proposition that service of process must be sufficient to afford a defendant reasonable notice and opportunity to be heard. In this regard, this Court has repeatedly held that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of

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2. CPLR § 5305(a)(3) provides that a foreign judgment shall not be refused recognition for lack of personal jurisdiction, "if defendant prior to commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved."

3. The forum selection clause in Stallion's contract contains no provision specifying the manner of service of process.

> the action and afford them an opportunity to present their objections.

Tulsa Prof'l Collection Serv., Inc. v. Pope, 485 U.S. 478, 484 (1988) (*citing Mullane v. Centr. Hanover Bank & Trust Co.*, 339 U.S., 306 (1950)); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988); *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964).

These basic constitutional principles are equally applicable under New York law. Indeed, the New York State Court of Appeals has held that service of process must be made "in a manner which, objectively viewed, is calculated to give a corporation fair notice" of the proceeding against it. *See Fashion Page v. Zurich Ins. Co.*, 50 N.Y.2d 265, 272 (1980). And, in its most recent pronouncement on the subject of recognition of foreign judgments, that Court has held that "the inquiry turns on whether exercise of jurisdiction by the foreign court comports with New York's concept of personal jurisdiction [and] . . . is not otherwise repugnant to our notion of fairness." *Sung Hwan Co., Ltd. v. Rite Aid Corp.*, 7 N.Y.3d 78, 83 (2006).

This threshold requirements of notice and opportunity to be heard are so fundamental that, even where parties had agreed, ahead of time, to submit to the jurisdiction of a foreign tribunal and have appointed an agent for service of process for this purpose, this Court has held that "adequate and timely notice . . . is a prerequisite to a valid judgment" issued by the tribunal agreed-upon by the parties. *Nat'l Equip. Rental, Ltd.*, 375 U.S. at 318. Indeed, in the Second Circuit opinion

in the same case, that Court noted that enforcement of jurisdiction and forum selection clauses in contracts is "limited by due process considerations". *Nat'l Equip. Rental, Ltd. v. Reagin*, 338 F.2d 759, 761-62 (2d Cir. 1964).

The manner in which service was attempted here, viewed under any objective criteria, did not give Stallion adequate or "fair" notice of the French proceeding. The service papers were not translated into English and the process server simply "left" them with Stallion's clerical staff, who were not authorized to accept service. Nor does such remarkably careless manner of delivering important court documents comport with our notions of fairness. *See, e.g. Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (Exercise of personal jurisdiction must comport with traditional notions of "fair play and substantial justice"). Stallion's employees or officers, having no knowledge of French, would have no way of determining from a French writ where and/or when to appear or the nature of the claims asserted.

This case is plainly distinguishable from *Dynamic Cassette Int'l, Ltd. v. Mike Lopez & Assoc.*, 923 F. Supp. 8 (E.D.N.Y. 1996), the only decision the Appellate Division cited in support of its finding that Stallion was precluded from raising a due process challenge to service of process by the forum selection clause in its contract. In *Dynamic Cassette*, the court found that "defendant . . . was served in the English action in accordance with Texas law" and only then proceeded to examine whether additional basis for exercise of personal jurisdiction were present in defendant's contract. *Id.*, 923 F. Supp. at 11. Here, by contrast, the

appellate court failed to consider the threshold issue of violation of Stallion's due process rights by defective Hague Convention service.

The New York State Court of Appeals' decision in this case, taken to its logical extreme, leads to an absurd result that any manner of service of process—whether or not it conforms to basic due process requirements of notice and opportunity to be heard—would be sufficient to confer personal jurisdiction over a defendant, as long as it had agreed that disputes would be submitted to a foreign tribunal. Such a result runs afoul of bedrock principles of due process and basic fairness.

In fact, the New York Appellate Division, First Department decision below effectively acknowledged the fundamental nature of "objections [to service] based on due process." Pet. App. 11a. Citing solely to *Burda Media, Inc. v. Viertel*, 417 F.3d 292 (2d Cir. 2005), the appellate court, however, speculated that service in this case was "unlikely to give rise" to such objections. *Id.* However, in *Burda Media*, unlike the present case, defendant's actual notice of the foreign proceeding against him was never in question. *Id.*, 417 F.3d at 299. The Second Circuit found that the defendant was precluded from raising jurisdictional objections by (a) overwhelming evidence of his willful disregard and evasion of plaintiff's efforts to effect proper service under the Hague Convention and (b) his ultimate acknowledgment, in writing, of the receipt of service papers. *See id.*, 417 F.3d at 295-297, 299, 302-303.

This is a far cry from the circumstances here, where service on Stallion was neither acknowledged nor

sufficient to provide it with reasonable notice of the French proceeding. Thus, constitutional principles of due process, comity and inherent fairness require that the French default judgment in question not be granted full faith and credit.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that Certiorari be granted. The Court may wish to consider summary reversal of the decision of the New York State Court of Appeals.

Respectfully submitted,

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